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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-206

COLQUITT COUNTY BOARD OF EDUCATION, et al.,
Petitioner,

versus

WILMA JOYCE HARRINGTON, et al. and
E. E. REID, JR., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

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COLQUITT COUNTY BOARD OF EDUCATION, et al.,
Petitioner,

versus

WILMA JOYCE HARRINGTON, et al. and
E. E. REID, JR., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 10, 1972

CITATION TO OPINIONS BELOW

The opinion of the District Court for the Middle District of Georgia originally approving the desegregation plan of Petitioners is printed in Appendix D hereto and is unreported. The opinion of the Court of Appeals reversing the judgment of the District Court and remanding for consideration of the plan of the Respondents, Reid, et al., is printed in Appendix C here-

to and is reported at 450 F.2d 1113. The opinion of the District Court considering the plans of Petitioners and Respondents, Reid et al., and reapproving the plan of Petitioners is printed in Appendix B hereto and is unreported. The opinion of the Court of Appeals which reversed the judgment of the District Court is printed in Appendix A hereto and is not yet reported in the official reports.

JURISDICTION

The opinion of the Court of Appeals, printed in Appendix A hereto, was entered on May 10, 1972. The Court of Appeals denied a petition to recall and stay its mandate on June 9, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTIONS PRESENTED

1. Is a school district, in which no school has a higher percentage of Negro students than 56.91 an effectively desegregated system, so as to preclude substitution of judicial discretion for that of school authorities in determining the method of achieving a unitary school system?

2. Is the school system involved here desegregated, even though each school in the district does not reflect the ratio of white to black that the races bear to each other in the system as a whole?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provision involved is the equal protection clause of the fourteenth amendment which provides that "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioners are the duly constituted and acting school authorities of Colquitt County, Georgia.

The Colquitt County school district contains fourteen elementary schools which form the basis for the litigation here. Prior to the 1971 school year, one of these elementary schools, located within the City of Moultrie (the county seat), and with a large enrollment, was predominately Negro. On June 29, 1971, the United States Court of Appeals for the Fifth Circuit directed the District Court for the Middle District of Georgia to implement a plan for the 1971-72 school year which would achieve a greater degree of desegregation among the Gray (the predominately Negro School), Vereen, Wright, Central and Cox elementary schools than existed under the plan of the Board of Education for the 1970-71 school year. On remand, the Board of Education submitted a modification to its previously filed plan which, through pairing and bussing, would produce the following percentages of white and black students in the schools set out in the Court of Appeals' mandate:

Central	52.3% white	47.7% Negro
Cox	56. % white	44. % Negro
Gray	52.4% white	47.6% Negro
Vereen	50.9% white	49.1% Negro
Wright	55. % white	45. % Negro

(R. 285-87).[1]

After the submission of the Board's plan to the District Court, the Respondents, Reid, et al., who are white citizens and residents of Colquitt County, Georgia, who reside within the corporate limits of the City of Moultrie, filed a petition to intervene, in which they stated that the plan submitted by the Board did not take into account its impact upon them and those similarly situated, and failed to achieve the objectives set forth in *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). The petition further stated that a majority of the Board of Education resided outside the corporate limits of the City of Moultrie, that the plan was inequitable in that it would have the effect of establishing the ratio of white to black students in the county extremely high and would make the ratio of black to white in the City of Moultrie sufficiently high so that the schools operated in the City would be referred to as black schools and the schools operat-

[1]Under the Board's plan all students in grades kindergarten through four residing in the zones serving the Central, Vereen, Cox and Wright elementary schools during the 1970-71 school year were assigned to those schools during 1971-72. All students residing in the zones serving those schools and Gray elementary school (the formerly predominate Negro school-during the 1970-71 school year in grades five through seven were assigned to the Gray school. All students residing in the zone serving the Gray school in 1970-71 were assigned to the Central, Vereen, Cox and Wright schools.

ed in the County as white schools. The Respondents, Reid, et al., then submitted a plan of their own which would incorporate into the desegregation plan of the Board an additional five schools within the system and which would produce a ratio of white to black in the ten schools involved of approximately 70 to 30 (R. 288-91).[2] The Negro plaintiffs in the court below found no fault with the plan submitted by the Board.

A hearing was held by the District Court at which time the court allowed the intervention and permitted the Respondents, Reid, et al., to submit argument and testimony in support of their plan. The court then found that the Board has complied with the mandate of the Court of Appeals and approved its plan (Appendix D). On appeal, the Court of Appeals reversed, and directed that the District Court conduct an evidentiary hearing on the merits of the Intervenors' plan, *withholding ruling on whether the District Court had fully complied with the principles established in Swann, supra, and whether the Board of Education had failed to abolish a dual school system* (Appendix C).

Another evidentiary hearing was then held by the District Court on February 17, 1972. It appeared that operation under the Board's plan during 1971-72 had

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[2]Under the Intervenors' plan, five schools are added and the sixth and seventh grades are assigned to the Gray school, with students in the Gray zone being spread among the remaining nine schools.

produced the following enrollment statistics in the elementary schools comprising the system:

School	*% white*	*% Negro*
Berlin	78.38	21.62
Central	47.78	52.22
Cox	51.70	48.30
Culbertson	99.58	.42
Doerun	53.11	46.89
Funston	86.17	13.83
Gray	43.09	56.91
Hamilton	73.52	26.48
Norman Park	76.43	23.58
Okapilco	86.92	13.08
Reedy Creek	82.90	17.60
Sunset	95.80	4.20
Vereen	52.76	47.24
Wright	52.03	47.97

(R. 9).

At the first hearing, a witness for the Board of Education testified that cost would be a critical factor in implementing the plan of the Intervenors (R. 259-60); however, at the second hearing it appeared that expenses had not been as great as anticipated during 1971-72 and that funds would be available to purchase and maintain the additional busses needed (R. 68). He further testified that the Board instructed its administrative personnel to prepare various plans that would result in as few split classes as possible (R. 237-38) and would permit the Board to carry on as good an educational program as possible (R. 268). He also tes-

tified that all principals and administrative personnel acquiesced in the plan as educationally sound (R. 269). In connection with transportation as it affects various students, the witness testified that some of those students attending the five schools sought to be added to the plan by the Intervenors had already ridden busses for considerable distances when they reached the schools they attended in the 1970-71 school year, and that to require them to change busses and ride further to another school would cause them to spend unreasonably long hours in transportation (R. 231-32). He also testified that in adopting its plan, the Board did not set out to achieve specific ratios of students in the various schools, but rather, to effectively end substantially one race schools, and to follow the mandate of the court (R. 236).

At the second hearing, the Intervenors introduced testimony to the effect that the total cost of implementing their plan would not exceed approximately $20,000.00 per year (R. 68) and that certain teachers felt that their plan was superior educationally to that of the Board (R. 42, 82-84). At both hearings, they introduced evidence that the distances and times involved in bussing children under their plan are not great (R. 150-52, 185-86), and that because the children in all grades ride the same busses as those ridden by students attending the consolidated eighth through twelfth grades, who must transfer at elementary schools and be rebussed, that their plan would not require earlier rising for the children in the sixth and seventh grades to be included by them in the plan. (The Superintendent of the system testified that some of the children attending

the schools sought to be added by the Intervenors were, during 1971-72, catching the bus at 7:00 A.M., which is earlier than the Board of Education had anticipated (R. 98), and that if the Intervenors' plan is adopted, pupils would be required to board the busses even earlier (R. 98). This is so, obviously, because of the handling of additional pupils. Involved would be not only sixth and seventh graders, but those in all other grades also.)

The Superintendent testified at the second hearing that, all other things being equal, the ratio of 70% white students to 30% Negro students in each school would be a desirable goal (R. 98),[3] but that the Negro population is centered, geographically, in three areas within the county: in northwest Moultrie, in Doerun and in Norman Park (R. 100), the areas containing schools with the highest ratios of Negroes to whites (R. 98). He testified that to transport the students attending the schools sought to be added by the Intervenors would significantly increase the time which young children would be required to spend on school busses and that this would be true even though the distances between the schools themselves would not necessarily indicate such a result (R. 98, 72). He testified that this is so because of the necessity of transferring large additional groups of students to new busses when many of them have already ridden busses for fifteen or sixteen miles, they being disbursed over a much wider area than those attending the schools in the Board's plan (R. 58, 61, 98).

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[3]The ratio of white to Negro in the county school population is approximately 70 to 30.

The District Court again approved the Board's plan, finding, first, that the Board of Education had effectively desegregated its school system since in those areas of the district in which there were heavy Negro populations, drastic measures were taken to break up formerly predominately white and formerly predominately Negro schools, that while Negroes were in a majority in two schools, in the school with the greatest margin this difference was only 13.82 percent, and that all schools except one had a substantial Negro enrollment. The Court of Appeals reversed, holding that the Board's plan was clearly inadequate to constitute full compliance with *Swann* principles, and that the plan of the Intervenors should be adopted.

Jurisdiction in the court of first instance was invoked under the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

Since *Brown I, Brown v. Bd. of Ed. of Topeka,* 347 U. S. 483 (1954), when this Court held that "the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment," the essence of the constitutional denial in public school desegregation cases has been the inferior education imposed on Negro children by virtue of their segregation from whites in the classroom.

In noting that the essence of a unitary school system does not lie in racial ratios, or even in the absence of some all black or all white schools, the Court of Appeals for the Fifth Circuit aptly stated that the deficiencies "lie ... in the fact that a substantial number of Negro students will receive their . . . public school education in a segregated environment, which is presumably largely the result of the State's operation of a dual system with schools located to serve that system." *Singleton v. Jackson Mun. Sep. Sch. Dist.*, 426 F.2d 1364 (5th Cir. 1970). This duty to *Negro* students was the basis for the finding of a deficiency in *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969), wherein out of 22 schools, 10 were all Negro, in *Green v. County Sch. Bd. of New Kent Co., Va.*, 391 U.S. 430 (1968), wherein out of two schools, one was all Negro, and in *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971), wherein, under the Board's plan, out of 21 junior high schools, 1 was 90% Negro, and in the elementary schools, more than half of the Negro pupils were in schools that were 86% to 100% Negro.

While the Board of Education in this case has not achieved a racial balance in its schools under its plan, no Negro student in the system will receive any of his public school education in a segregated environment. Indeed, while two schools within the system are almost all white, only two schools have Negro majorities after one year of experience with the Board's plan, and in the school in which Negroes are in the greatest majority, they represent only 56.91% of that school's population. Thus, the essence of the constitutional de-

nial, segregation of Negro students, simply does not exist in the Colquitt County school system under the Board's plan.

This Court held in *Swann, supra,* that "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole," and that school boards are vested with plenary powers in the operation of their systems, and only upon default by them in meeting their constitutional obligations are courts vested with the authority to exercise these plenary powers. Thus, if the constitutional violation does not exist under the plan of the Board, it should stand, whether a court or courts consider another plan superior or not.

In addition, because of the transportation problems indicated above, the plan of the Board appears to be the most practical under the circumstances. While the Intervenors talk of the necessity to increase desegregation in certain schools, it is obvious that their purpose is a simple desire to have some of the Negro students moved out of their schools, a matter not included in the constitutional proscription.

CONCLUSION

Petitioners respectfully submit that the Court of Appeals has improperly substituted its judgment for that of the board of education, contrary to the applicable decisions of this Court, and that this petition for a writ of certiorari should be granted.

JAMES C. WHELCHEL
Counsel for Petitioners

Of Counsel:
WHELCHEL & WHELCHEL
August 3, 1972

CERTIFICATE OF SERVICE

I, James C. Whelchel, of counsel for Petitioners, Colquitt County Board of Education, et al., do hereby certify that I have this day served copies of the foregoing petition for a writ of certiorari upon the following counsel for the parties, at the addresses shown, under cover of sufficient postage to insure first class delivery; C. B. King, P. O. Box 1024, Albany, Georgia 31702, attorney for Wilma Joyce Harrington, et al.; Reuben H. Yancey, P. O. Box 1507, Valdosta, Georgia 31601, attorney for Franklin Sutton, et al.; and Messrs. Thomas K. Vann, Jr. and Frank T. Holt, P. O. Box 1053, Thomasville, Georgia 31792, attorneys for Intervenors, E. E. Reid, Jr., et al.

This ____ day of August, 1972.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1579

WILMA JOYCE HARRINGTON, ET AL.,
Plaintiffs,

versus

COLQUITT COUNTY BOARD OF EDUCATION, ET AL.,
Defendants-Appellees,

E. E. REID, JR., JOHN W. MOBLEY, ET AL.,
Intervenors-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

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(May 10, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: Again we deal with the school desegregation problems of Colquitt County, Georgia.[1] Today we review two plans proposed below to eliminate the dual elementary school system in Colquitt County. After a review of the record and briefs, we vacate the judgment below and direct the district cour to adopt the plan proposed by the intervenors, Reid, et al.

This Court on June 29, 1971, directed the district court to order the school board of Colquitt County to implement a plan for the 1971-1972 school year which would achieve a greater degree of desegregation among the five elementary schools in Moultrie, the principal city in Colquitt County. This plan was to comply fully with the principles established in *Swann v. Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 91 S.Ct. 1267 28 L.Ed.2d 554. *Harrington v. Colquitt County Board of Education*, 5 Cir. 1971, 446 F.2d 1011. The school board subsequently proposed a plan which would desegregate these five grammar schools by creating a ratio of from 50.9 to 56% white and from 44 to 49.1% black children in each of the schools. This result would be achieved by busing.

At this point, Reid, et al., white residents of Moultrie, intervened in the action. The intervenors objected to the school board's plan on the basis that it would leave five elementary schools immediately outside the city

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[1]In chronological order: Harrington, et al. v. Colquitt County Bd. of Ed., et al., 5 Cir. 1971, 446 F.2d 1011; Harrington, et al., Sutton, et al. v. Colquitt County Bd. of Ed., 5 Cir. 1971, 449 F.2d 171; Harrington, et al. v. Colquitt County Bd. of Ed. v. Reid, et al., 5 Cir. 1971, 450 F.2d 1113.

limits of Moultrie with a ratio of 90% white and 10% black children. Fearing a white exodus from the five elementary schools in the city of Moultrie, the intervenors proposed a "70-30" plan to the district court. In essence, this plan would achieve a ratio of approximately 70% white and 30% black children in each of the five schools in Moultrie as well as the five outside the city. As with the school board's plan, this result would be achieved by busing. The district court, however, erroneously construed this Court's order of June 29 to mean that he had no authority to go beyond that order and consider a plan which concerned five additional schools not mentioned on the prior appeal (i.e., the five elementary schools outside Moultrie), and on that basis approved the school board's plan. On appeal, on October 28, 1971, we vacated the judgment of the district court and remanded the cause to that court with directions to hold a full evidentiary hearing upon and to consider the intervenors' plan for integrating the grammar schools of Colquitt County. *Harrington v. Colquitt County Board of Education*, 5 Cir. 1971, 450 F.2d 1113.

On February 17, 1972, the district court held the directed evidentiary hearing on the intervenors' plan. Evidence was introduced at this hearing which showed that: (a) attendance at the five elementary schools in the city of Moultrie in 1971 (the school board's plan was implemented for the 1971-72 school year) ranged from 43.09 to 52.76% white and from 47.24 to 56.91% black; (b) attendance at the five elementary schools outside the city of Moultrie not included in the school board's plan was from 82.40 to 99.58% white and from

-42 to 17.60% black children; (c) the intervenors' plan would accomplish a racial balance of from 64.2 to 69.2% white and from 30.8 to 35.8% black children in each of the five schools in Moultrie, while attaining a ratio of from 67.6 to 70.5% white and from 29.5 to 32.4% black children in each of the five schools outside the city of Moultrie;[2] (d) the intervenors' plan would not cost significantly more than the school board's plan to implement; (e) the intervenors' plan would entail between nine and sixteen minutes more busing time each way for the school children bused to the five outside schools now involved under the school board plan; and (f) the intervenors' plan was as sound educationally as the plan proposed by the school board. Despite this evidence, the district court held that the school board's plan sufficiently met the requirements

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[2]The following information regarding attendance was introduced at the hearing below:

The five elementary schools in Moultrie covered by the school board's plan:	1971 attendance		Projected attendance under the Intervenors' plan	
	%white	%black	%white	%black
Central	47.78	52.22	66.1	33.9
Cox	51.70	48.30	67.4	32.6
Gray	43.09	56.91	64.2	35.8
Vereen	52.76	47.24	69.2	30.8
Wright	52.03	47.97	69.2	30.8
The five elementary schools outside Moultrie not covered by the school board's plan:				
Culbertson	99.58	.42	69.4	30.6
Okapilco	86.92	13.08	70.5	29.5
Reedy Creek	82.40	17.60	69.0	31.0
Sunset	95.80	4.20	69.4	30.6
Funston	86.17	13.83	67.6	32.4

of *Swann*, and ordered implementation of this plan for the 1972-73 school year. This appeal by the intervenors timely followed.

Swann teaches that our purpose in these proceedings must be "... to eliminate from the public schools all vestiges of state-imposed segregation", 402 U.S. at 15, 91 S.Ct. at 1275, 28 L.Ed.2d at 566, and that ". . . a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness", 402 U.S. at 25, 91 S.Ct. at 1280, at L.Ed.2d at 572, in achieving this purpose. In addition, the Supreme Court held in *Swann* that:

> "... in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed. 2d at 572.

The five elementary schools outside the city of Moultrie are predominately of one race (white), and thus come under the Supreme Court's proscription in *Swann*. In light of the history of segregation in Colquitt County, the existence of an alternative plan that eliminates the single race characteristic of the five predominately white elementary schools outside Moultrie, and the minimal burden adoption of this plan would entail, a "close scrutiny" of the school board's plan reveals that it does not overcome the presumption against the "continued existence of some schools that are all or predominately of one race". Keeping in mind the Supreme Court's admonition in *Davis v. Board of School Commissioners of Mobile County*, 1971, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577, a companion case to *Swann*, that "[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation", 402 U.S. at 37, 91 S.Ct. at 1292, 21 L.Ed. 2d at 580-581, we therefore find that the plan proposed by the school board and approved by the district court here is clearly inadequate to constitute full compliance with *Swann* principles. Further, we agree with the Sixth Circuit that "[w]here there has been a history of state-imposed segregation of the schools, it is not sufficient to adopt a plan which, out of context, might be seen as nondiscriminatory but which does not do as much to disestablish segregation as an alternative proposal which is feasible and pedagogically sound". *Robinson v. Shelby County Board of Education*, 6 Cir. 1971, 442 F.2d 255, 258.

Nor do we feel that the intervenors' use of mathematical ratios renders their plan fatally defective. The Supreme Court in *Swann* prohibited the use of mathematical ratios only where there was no finding of constitutional violation. Although pointing out that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole", 402 U.S. at 24, 91 S.Ct. at 1280, 28 L.Ed.2d at 571, the Court proceeded:

> "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios [here] was within the equitable remedial discretion of the District Court". 402 U.S. at 25, 91 S.Ct. at 1280, 28 L.Ed.2d at 572.

The use of mathematical ratios in the instant case provides a "useful starting point" in drawing up an effective desegregation plan which will meet the mandate of *Swann*.

We therefore vacate the judgment below and direct the district court to adopt the intervenors' plan. The district court is also directed to schedule expedited hearings for such modifications to the intervenors' plan as may be necessary to correct unworkable elements in the plan and to allow the parties an opportunity to suggest improvements in the plan, to the end that these ten elementary schools will be more effec-

tively desegregated than they were under the present school board plan.[3] See, e.g., *Bivins v. Bibb County Board of Education*, 5 Cir. 1970, 424 F.2d 97. These hearings must be held promptly so as not to delay the full implementation of the plan by the start of the 1972-1973 school year.

The district court shall require the school board to file semi-annual reports during the school year under the requirements of *United States v. Hinds County School Board*, 5 Cir. 1970, 433 F.2d 611, 618-619.

The mandate shall issue forthwith.

VACATED AND REMANDED WITH DIRECTIONS

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[3]As in other cases, we caution against placing the burden of disestablishment of the dual school system in Colquitt County predominately upon the black students. See, e.g., *Lee v. Macon County Board of Education*, 5 Cir., 1971, 448 F.2d 746.

APPENDIX B

MEMORANDUM OPINION AND ORDER

Filed: Feb. 28, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

WILMA JOYCE HARRINGTON, et al.,
Plaintiffs

versus Civil Action No. 728

COLQUITT COUNTY BOARD OF EDUCATION, et al.,
Defendants

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit, the Colquitt County Board of Education in the summer of 1971 submitted to this Court for approval a revised desegregation plan which would substantially increase the degree of racial integration in the Colquitt County schools. Whereupon a group of white citizens in the county filed an intervention opposing the plan submitted by the Board and urging the approval of a plan suggested by the Intervenors. The Negro Plaintiffs found no fault with the plan submitted by the Board. After hearing this Court approved the plan submitted by the Board and directed its implementation. The Intervenors appealed. By its decision the Court of Appeals did not pass on the merits of the matter, but remanded the case to this court with direction that further evidentiary hearing be ac-

corded the Intervenors to determine whether the Intervenors' plan should be adopted in preference to the plan adopted by the Board.

The Court of Appeals, in considering the Intervenors' contentions "that (1) the District Court erred in not fully complying with the principles established in *Swann;* (2) the District Court erred in interpreting the mandate of this Court; and (3) the Colquitt County School Board failed to abolish a dual school system," did not rule on the first and third issues presented, but simply held that this Court erred in interpreting its mandate of June 29, 1971. Therefore, the issues raised by the Intervenors' contentions (1) and (3) are now ripe for determination in this Court.

It should be noted that in *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, ____ U.S. ____, 91 S.Ct. 1267 (1971), the Supreme Court held that "in seeking to define even in broad and general terms how far this remedial power [of the District Court] extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." Therefore, it becomes the first task of this Court to determine whether or not the Colquitt County Board of Education has offered acceptable remedies to meet its constitutional obligations. If such remedies have been offered, then, under *Swann,* this Court would not be authorized to substitute its judgment for that of the Board of Education.

Prior to this Court's order of July 6, 1971, one predominantly black school remained within the system, with an enrollment of 858 black students and one white student. In this Court's order of July 6, 1971, the Board was ordered to submit a revised plan which would satisfy the requirements of the Court of Appeals and the Supreme Court as required in the mandate of the Court of Appeals dated June 29, 1971. Pursuant to the order, the Board of Education submitted a plan under which all students in grades kindergarten through four residing in the zones serving the Central, Vereen, Cox, and Wright Elementary Schools during the 1970-71 school year would be assigned to those schools during the 1971-72 school year. All students residing in the zones serving those schools and Gray Elementary School (the predominantly black school) during the 1970-71 school year in grades five through seven would be assigned to the Gray Elementary School. Those students residing in the zone serving the Gray Elementary School in the 1970-71 school year in grades one through four would be assigned to the Central, Vereen, Cox, and Wright Elementary Schools. This plan has now been in effect for approximately six months and, as a result of its implementation, no predominantly black schools remain within the system.

While it is true that one or two virtually all-white schools remain within the system, this does not necessarily make the plan of the Board ineffective. As noted by the Supreme Court in *Swann*, "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole". But "schools all or predominantly of one race in a dis-

trict of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation". In the plan under consideration here, if schools remained with heavy concentrations of black students, while other schools remained virtually all-white, a serious question might arise as to whether the school assignments made by the Board are genuinely non-discriminatory. However, the evidence indicates that in those areas of the district with heavy Negro populations drastic measures were taken to break up formerly predominantly white and predominantly black schools. As in *Swann*, "pairing, 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools," were used. While blacks are in a majority in two schools within the district, in the school with the greatest margin this difference is only 13.82 per cent, and all schools except one have a substantial black enrollment.

The Intervenors have placed great emphasis on racial ratios in their presentation to the Court. But as noted by the Supreme Court in *Swann*, "school authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however,

that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In *default* (emphasis supplied) by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." Here, it appears that the Board of Education has effectively desegregated its school system, and, that having done so, its plan should be approved.

But even assuming this Court to be entitled to exercise the broad plenary powers residing in the Board of Education, it appears that the plan adopted by the Board constitutes the best means for achieving desegregation of this sytem under the circumstances now existing. While finances have not proved to be as serious a problem in practice as the Board anticipated before the plan was put into effect, it appears that finances will still have some bearing on the matter in the future. The greatest problem appears to present itself in the matter of transportation. The students who live within the Central, Cox, Gray, Vereen and Wright zones all live within a relatively small geographic area while those attending the Culbertson, Okapilco, Reedy Creek, Sunset and Funston schools, sought to be added by the plan of the Intervenors, are much more widely dispersed. Should the students in these zones be incorporated into the pairing plan as proposed by the Intervenors, it would be necessary for the students living in the zones served by the schools sought to be added by them to be bused first to those schools, transferred to other buses, and then bused to the Gray school, adding considerably to the

time spent in transit by those pupils. No such requirement exists in the zones contained in the plan of the Board.

Certain witnesses of the Intervenors testified that the plan of the Intervenors was more educationally sound than that of the Board. However, at the hearing held by the Court on August 6, 1971, a member of the Board of Education testified that the plan of the Board had been submitted to the administrative personnel and that the quality of teaching would not be greatly changed by switching from the Board's plan to the plan of the Intervenors.

The Intervenors criticize the Board's plan as being likely to encourage a mass migration of whites from the zones serving the schools embodied in the Board's plan. The fact that the racial percentages in these schools as of October, 1971, do not vary greatly from the percentages projected by the Board before the beginning of the school year indicates that such has not been the case.[1] In addition, the Doerun zone, located within the district, had ratios beginning with the 1970-71 school term similar to those in the schools in the City of Moultrie during 1971-72. The experience there during those one and one-half years indicates no appreciable change in percentages of white and black students. But in any event, community reaction is not determinative in school desegregation cases. *cf. Bell v. West Point Mun. Sep. School Dist., 446 F.2d 1362 (5 Cir. 1971).*

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[1]A sheet showing the pertinent current enrollment statistics is attached hereto.

The plan of the Board is sound and meets the requirements of *Swann*. It is therefore approved.

IT IS SO ORDERED this 25th day of February, 1972.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

APPENDIX C

Filed: Oct. 28, 1971

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2626

WILMA JOYCE HARRINGTON, ET AL.,
Plaintiffs-Appellees,

versus

COLQUITT COUNTY BOARD OF EDUCATION, ET AL.,
Defendants-Appellees,

versus

E. E. REID, JR., ET AL.,
Intervenor-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

(October 28, 1971)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

BY THE COURT: We review[1] and vacate an order entered by the district court following the going down of our mandate under our last order in this case, *Harrington v. Colquitt County Board of Education*, 5 Cir. 1971, ____ F.2d ____ [No. 30,572, decided June 29, 1971].

In *Harrington v. Colquitt County Board of Education*, supra, this Court, on June 29, 1971, directed the district court to order the school board of Colquitt County, Georgia, to

[1]Under the stringent requirements of *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed. 2d 19 (1969), which this Court has carried out in *United States v. Hinds County School Board*, 5 Cir. 1969, 417 F.2d 852, and of *Carter v. West Feliciana Parish School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970), implemented in *Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1970, 419 F.2d 1211, this Court has judicially determined that the ordinary procedures for appellate review in school desegregation cases have to be suitably adopted to assure that each system whose case is before us "begin immediately to operate as unitary school systems". Upon consideration of the parties' memoranda and so much of the record as is available or determined to be needed by the Court, the Court has proceeded to dispose of this case as an extraordinary matter. Rule 2, F.R.A.P.

> ... implement a plan for the 1971-72 school term which will achieve a greater degree of desegregation among the Grey, Vereen, Wright, Cox, and Central elementary schools than now exists under the present elementary attendance zone plan. Such plan shall comply fully with the principles established in *Swann v. Charlotte-Mecklenberg Board of Education* ...

Pursuant to this order, the school board proposed a plan to the district court which would desegregate the above five grammar schools, all within the city limits of Moultrie, Georgia. In effect, the plan would create a ratio ranging from 50.9 to 56% white and 44 to 49.1% black children in each of the schools. The plaintiffs, Harrington, et al., offered no objections to the adoption of this plan. At this point, Reid, et al., white residents of the city of Moultrie, intervened in the action, objected to the school board's plan and proposed their own plan to the district court.

The intervenors' primary objection to the school board's plan was that it would leave five elementary schools outside the city limits of Moultrie with a ratio of 90% white and 10% black children. The Reid group urged that adoption of this plan would: (1) work a hardship on public education in Moultrie and destroy public support, since the city schools would have to cope with a large percentage of allegedly poorly educated, economically stricken black children; (2) cause irate white parents to enroll their children in all-white private schools because of this high percentage of blacks in Moultrie's elementary schools; and (3) cause

a great number of white parents to move beyond Moultrie's city limits in order to escape integration since the five grammar schools outside the city limits were exempt from the school board's present plan before the district court.

The Reid intervenors asked the district court to adopt a "70-30" plan, which they felt would more fairly integrate the elementary schools in the county. (The ratio of school children in the entire county is 70% white and 30% black). In essence, this plan would create a ratio of 70% white and 30% black children in the five grammar schools in Moultrie and the five outside the city. As with the school board's plan, this result would be achieved by busing.

In response to the intervenors' arguments, the trial court gave to this Court's order of June 29 an unnecessarily narrow construction, and thereby misconstrued its duty in the premises. The lower court, in ruling against the intervenors, stated that inasmuch as this Court's mandate of June 29 only went to the five specifically enumerated city schools he had no authority to go beyond that order and consider a plan which concerned five additional schools not mentioned on the prior appeal. The court further declared that this Court's order of June 29, by specifically naming only the five city schools, impliedly approved the rest of the school board's integration plan for the county. In conclusion, the district court held that the school board had fully complied with this Court's order and adopted their plan. Reid, et al., then brought this appeal.

On appeal, the intervenors argue that (1) the district court erred in not fully complying with the principles established in *Swann*; (2) the district court erred in interpreting the mandate of this Court; and (3) the Colquitt County school board failed to abolish a dual school system. . .

It is unnecessary for this Court to rule on the first and third issues presented by the appellants in order to dispose of this case, since we agree that the district court erred in its interpretation of our order of June 29. The sole issue presented for our review in that order was whether the school board's integration plan for the five enumerated elementary schools met constitutional standards. Our ruling of June 29 did *not* preclude the district court from continuing to hear evidence on and make other changes in the school board's plan, nor did this Court, by that ruling, impliedly approve of the rest of the school board's plan. This Board of Education, along with countless others is under a continuing duty to achieve a unitary school system. The court below, along with other district courts is under a continuing duty to exact compliance with that duty by the Board of Education.

Since the court below refused to conduct an evidentiary hearing on the merits of the appellant's plan, comment thereon by us at this juncture would be premature. We merely direct the district court to hold a full evidentiary hearing on this plan for consideration of its feasibility.

Nothing in this order shall preclude the district court from considering fully in the future the merits of any

and all parts of the school board's plan, opposition to it, and proposed alternative plans. The district court is, of course, to conduct its deliberations under the principles outlined in *Swann v. Charlotte-Mecklenberg Board of Education*, 1971, U.S. , S.Ct. , ____ L.Ed.2d ____.

The judgment of the district court is vacated, and the cause is remanded to that court with directions to hold an evidentiary hearing upon and consider the appellants' proposed plan for integrating the grammar schools of Colquitt County, Georgia.

The district court shall require the school board to file semi-annual reports during the school year similar to those required in *United States v. Hinds County School Board*, 5 Cir. 1970, 433 F.2d 611, 618-619.

The mandate shall issue forthwith.

VACATED AND REMANDED WITH DIRECTIONS.

APPENDIX D

MEMORANDUM OPINION AND ORDER

Filed: Aug. 9, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

WILMA JOYCE HARRINGTON, et al.,
Plaintiffs

versus Civil Action No. 728

COLQUITT COUNTY BOARD OF EDUCATION, et al.,
Defendants

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit, this Court entered its order requiring the defendant Board of Education to submit to this Court a revised plan for further desegregation of the Colquitt County School System which would comport with the requirements of the mandate issued by the Court of Appeals. Within the time prescribed by the Court's order the defendant Board of Education filed its amended plan. The Plaintiffs filed no objection to the amended plan. However, a group of citizens of Colquitt County filed a motion to intervene in order that they might make representations of opposition to the proposed plan. The Court allowed this intervention and the matter was brought on for hearing on August 6, 1971. A number of the intervening citizens were present with their counsel and suggested an alter-

nate plan and evidence was heard relative to all issues raised. Members of the defendant Board were present with their counsel. The Plaintiffs were represented at the hearing by their counsel and opposed the alternate plan suggested by the intervenors.

The mandate of the Court of Appeals required the School Board "to implement a plan for the 1971-72 school term which will achieve a greater degree of desegregation among the Gray, Vereen, Wright, Cox and Central Elementary Schools" than existed under the plan heretofore in operation. The evidence shows that the revised plan as submitted by the Board will fully comply with this requirement. The table below shows the racial percentages as they existed during the past school year and as they will exist under the revised plan.

	1970-71 School Year	*1971-72 School Year (Revised Plan)*
Central	74.1% white 25.9% black	52.3% white 47.7% black
Cox	86.0% white 14.0% black	56.0% white 44.0% black
Gray	.1% white 99.9% black	52.4% white 47.6% black
Vereen	89.2% white 10.8% black	50.9% white 49.1% black
Wright	98.0% white 2.0% black	55.0% white 45.0% black

The Court determines that the revised plan satisfies the requirements of the mandate as issued by the Court of Appeals and the plan is, therefore, approved.

IT IS SO ORDERED this 9th day of August, 1971.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE